U. S. Supreme Court

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TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 75

UNITED STATES OF AMERICA, PETITIONER,

vs.

SCHNEER'S ATLANTA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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1 In the United States District Court for the Northern District of Georgia, Atlanta Division

Civil Action No. ~~4250~~ 4520

UNITED STATES OF AMERICA, PLAINTIFF

vs.

SCHNEER'S ATLANTA, INC., DEFENDANT

COMPLAINT—Filed February 19, 1953

The United States of America brings this suit against defendant named above and alleges:

I

This is a civil action brought to enjoin violations by defendant of a price stabilization regulation issued pursuant to the Defense Production Act of 1950, as amended (Public Law 69, 82d Congress, 64 Stat. 798; Public Law 96, 82d Congress); to recover damages for violations of said regulation; and to obtain such other, further and different relief as may be just and equitable. Jurisdiction of the suit is vested in this Court by Section 706 (b) of the Defense Production Act of 1950, as amended, and also by Section 1345, Title 28, United States Code.

II

Defendant is a corporation organized under the laws of the State of Georgia, and is engaged within the territorial limits of the jurisdiction of this Court in the retail business, selling watches, watch bands, and watch chains. For said purpose the defendant maintains a retail store at 48 Whitehall Street, S. W., Atlanta, Fulton County, Georgia, in charge of Harry K. Stern, President and General Manager and at which the violations complained of herein occurred.

2

III

On February 26, 1951 the Director of Price Stabilization, pursuant to said Defense Production Act of 1950, Executive Order 10161 (15 F. R. 6105), and Economic Stabilization Agency General Order No. 2 (16 F. R. 738), issued Ceiling Price Regulation 7, and on February 26, 1951 issued Supplemental Regulation 1 to Ceiling Price Regulation 7, (16 F. R. 189). The said Ceiling Price Regulation 7 and Supplemental Regulation 1 to Ceiling Price Regulation 7, are hereinafter referred to, with all pertinent prior and subsequent amendments, as "the Regulation". The Regulation, which became effective February 27, 1951, has been and still is in full force and effect, and fixes ceiling prices for retailers of a wide range of commodities.

IV

Between February 27, 1951, and the present, defendant has sold and delivered jewelry items, including watches, watch bands and chains, at retail, maximum prices for which were established and are established by the Regulation.

V

a. Section 11 of the Regulation required defendant, as other sellers subject to the Regulation, to prepare and file with the Office of Price Stabilization a pricing chart as defined in the Regulations.

b. Section 51 of the Regulation required tagging each article with the ceiling price, or marking the shelf, bin, or rack, or other holder with the ceiling price, and the posting of a sign within the establishment to "the effect that the prices of merchandise of this store are no higher than the OPS ceiling price of the article."

c. Section 55(a) of the Regulation prohibited the selling or delivering of any article at a price higher than the ceiling price permitted by the Regulation.

VI

Section 409(a) of the Defense Production Act of 1950, *supra*, provides as follows:

> "Whenever in the judgment of the President any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provisions of section 405 of this title, he may make application to any district court of the United States or any United States court of any Territory or other place subject to the jurisdiction of the United States for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the President that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond."

VII

a. Since February 27, 1951, and continuing to the present defendant has sold and delivered, and intends to continue selling and delivering watches, watch bands and watch chains at prices in excess of the applicable prices under the Regulation.

b. Since February 27, 1951 defendant has sold watches, watch bands and watch chains in violation of Section 51, by failing to properly mark or tag articles covered by this Regulation with the ceiling price, and by failing to post the required sign in his place of business.

VIII

Section 409(c) of the Defense Production Act of 1950, *supra*, provides in pertinent part as follows:

> "If any person selling any material or services violates a regulation or order prescribing a ceiling or ceilings, the person who buys such material or service for use or consumption other than in the course of trade or

business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whatever of the following sums is greater: (1) such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50 as the court in its discretion may determine: *Provided*, however, that such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation or order in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the word "overcharge" shall mean the amount by which the consideration exceeds the applicable ceiling. If any person selling any material or service violates a regulation or order prescribing a ceiling or ceilings and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the President may institute such action on behalf of the United States within such one year period, or compromise with the seller the liability which might be assessed against the seller in such an action."

IX

a. During the month of March, 1952, the defendant sold and delivered some seventeen watches of which the plaintiff has specific knowledge at prices in excess of the ceiling prices established under applicable portions of the Regulation, such sales resulting in overcharges aggregating $328.94. These transactions are identified and described in detail in Schedule A attached hereto and made a part hereof. Schedule A sets forth for each such transaction

the date, name of purchaser, account number, commodity involved, stock number, cost in code, cost in dollars and cents, sales price, the list ceiling price, the tax, the total ceiling price and overcharge.

b. Since February 27, 1951, and continuing to the present the defendant has sold and delivered other items of jewelry including watches, watch bands and chains at prices
6 in excess of applicable maximum prices.

c. Plaintiff is presently unable to allege the total dollar amount by which the prices charged and received by defendant since February 27, 1951 exceeded the applicable maximum prices but can, and will, offer proof of such amount at the trial of this cause.

d. All of the transactions complained of herein occurred within one year of the filing of the complaint in this cause.

e. All of the transactions complained of herein either were in the course of the purchaser's trade or business, or, were other than in the course of the purchaser's trade or business and thirty days have transpired since the occurrence of the violation without any suit for damages having been filed by the purchaser.

f. None of the transactions complained of herein arose because defendant acted upon and in accordance with the written advice and instructions of the President of the United States or any official or employee authorized to act for him.

g. None of the transactions complained of herein arose out of the sale of any material or service, to any agency of the Government, pursuant to the lowest bid made in response to an invitation for competitive bids.

7 X

The United States of America brings this action in its sovereign capacity to accomplish the purposes of the Defense Production Act of 1950, *supra,* by enforcing necessary price controls designed to protect the national economy against future loss of needed purchasing power and to prevent a future collapse of values. Unless defendant and all persons in active concert or participation with defendant

are enjoined from further selling and delivering commodities at prices in excess of applicable ceilings established by the Regulation, the United States of America, plaintiff herein, will suffer immediate and irreparable injury for which it has no adequate remedy at law.

WHEREFORE, Plaintiff, the United States of America prays:

1. That this Court enter its order enjoining defendant, defendant's officers, agents, servants, employees, and all other persons in active concert or participation with defendant, and each of them, from (a) directly or indirectly selling or delivering any commodities or services at prices in excess of the applicable maximum prices under the Regulation as heretofore or hereafter amended, or under any price stabilization regulation hereafter issued which establishes maximum prices for any of such commodities
8-12 or services, and (b) from offering, soliciting, or agreeing to do any of the foregoing.

2. That this Court, pending the final determination of this cause, issue a preliminary injunction restraining and enjoining defendant, defendant's officers, agents, servants, employees, and all other persons in active concert or participation with defendant, and each of them, in the manner and form aforesaid.

3. That plaintiff be given judgment against the defendant in a sum equal to three times the amount of the prices charged and received from the jewelry items, including watches, watch bands and chains exceeded the applicable maximum prices therefor, within one year from the date of the filing hereof, together with reasonable attorney's fees and costs.

4. That this Court grant such other, further, and different relief as may be just and equitable.

(S.) J. ELLIS MUNDY,
United States Attorney.
(S.) ELMO HOLT,
Special Assistant,
United States Attorney.

Order to Show Cause, Summons, and Marshal's return omitted.

Filed Feb. 19, 1953.

EXHIBIT "A" (omitted in printing)

13 In United States District Court

ANSWER—Filed March 16, 1953

Comes now the defendant and files this its Answer to the above complaint subject to its motions heretofore filed and alleges:

1. In answer to paragraph I, defendant says that the items for which overcharges are claimed to have been made by the defendant have been decontrolled by the Office of Price Stabilization and are no longer subject to price controls, and therefore plaintiff is not entitled to an injunction and to the relief. Defendant admits the jurisdiction of the Court.

2. Defendant admits the allegations of paragraph II.

3. Defendant admits the allegations of paragraph III with the exception of the last sentence contained therein. The statements contained in the last sentence of said paragraph are denied.

4. Defendant admits the allegations of paragraph IV.

5. Defendant admits the allegations of subsections a and b of paragraph V. Answering sub-section c, the defendant alleges that Section 55(a) issued illegally by the Office of Price Stabilization and is contrary to the intent of the Act and contrary to Title 50 U.S.C.A. App. 2102 (g) and (k), as hereinafter more fully set out.

14 6. Defendant admits the allegations of paragraph VI.

7. Defendant denies the allegations of paragraph VII, a and b.

8. Defendant admits the allegations of paragraph VIII.

9. In answer to paragraph IX a, defendant states that in the normal course of its business it sold watches but that

the names of the customers and all other statements contained in Exhibit A referred to and made a part of said paragraph were prepared by a representative of the Office of Price Stabilization, and defendant can neither admit nor deny that said Exhibit A is correct, and it has no knowledge how the plaintiff arrived at the chart price or the overcharges. Defendant denies that the prices charged were in excess of ceiling prices established or in violation of existing price regulations or laws. Defendant denies that the cost prices set forth in Exhibit A are correct for the reasons hereinafter more fully set out.

10. Defendant denies the allegations of paragraph IX b.

11. Defendant states that it is not required to answer the allegation contained in Paragraph IX c.

12. Defendant can neither admit nor deny the allegations of paragraph IX d, but requests strict proof thereof.

13. For want of sufficient information, defendant can neither admit nor deny the allegations of paragraph IX e.

14. Answering paragraph IX f, defendant states that it is not guilty of any of the violations charged, but that it acted in accordance with the Defense Production Act, 50 U.S.C.A. Section 2102, etc., and as amended.

15. Defendant admits the allegations of paragraph IX g.

16. In answer to paragraph X, defendant states that the items, the subject matter of the within complaint, have been decontrolled by action of the Administrator of the Price Stabilization Act, and that the complainant is not entitled to the injunction sought.

17. Further answering said complaint, and by way of further defense, defendant alleges:

(a) That Schneer's Atlanta, Inc. was organized as a corporation by the Superior Court of Fulton County, Georgia, on July 7, 1944, and has been engaged as a corporation in the retail jewelry business continuously in the City of Atlanta, Fulton County, Georgia since said date.

(b) That the corporate stock of said corporation was owned by others than the present stockholder prior to March 23, 1951.

16 (c) That in March, 1951, negotiations took place for the purchase of the entire capital stock of said corporation to its present stockholder, and that the consideration paid for said capital stock was partially based upon the cost of the inventory as appearing on the records of said corporation and on hand and in said premises of the defendant on or about March 23, 1951.

(d) That the holders and owners of the capital stock of the defendant corporation prior to March 23, 1951, were also the holders and owners of capital stock of other corporations engaged in the retail jewelry business in various and sundry towns in the United States, and that the said stockholders also owned and controlled a corporation under the name and style of Franklin Corp. with offices in the City of New York, State of New York, which corporation acted as the buying agent for the various retail jewelry stores owned and controlled by said stockholders, and that such facts existed during the period from May 4, 1950 to June 24, 1950, and up to the date of the sale of said corporate stock on March 23, 1951.

(e) That the said Franklin Corp. purchased watches from various and sundry manufacturers or importers and had affixed to said watches the name 'Franklin' as a trade name and resold said watches to its various stores under said trade name and at prices higher than the Franklin

17 Corp. had paid to its sources of supply; that it also sold to said stores other items of jewelry and nationally advertised watches under the names of the manufacturers thereof, and defendant alleges, upon information and belief, at prices higher than it had paid for said items to the manufacturers thereof. The defendant has no knowledge of the percentage or amount of the profit or margins over cost the said Franklin Corp. charged to its various stores, including this defendant, but it alleges upon information and belief that a part of said margin over cost charged reflected the expense to the Franklin Corp. of locating, buying and selecting merchandise, cost of maintaining an office and warehouse, telephone, stationery, etc., and all other items of expense of operating a buying office,

plus a profit to said corporation. All of said buying expenses would otherwise have been the expense of said individual stores, including this defendant.

(f) That during the period from May 24, 1950 to March 23, 1951, the defendant had on hand a very large stock of said Franklin watches, but a large quantity thereof was unacceptable to the purchaser of said corporate stock and which the purchaser rejected as a part of the inventory of the defendant corporation, and shortly after March 23, 1951, returned said unacceptable inventory to the Franklin Corp.

(g) That the previous stockholders for some time prior to the consummation of the sale of said stock con-
18 templated the sale thereof and allowed the inventory to decrease from its normal amount in anticipation of said sale.

(h) The defendant replaced over a period of time subsequent to May 1, 1951, the said inventory rejected with a large quantity of Franklin watches in order to bring the same up to the normal and customary inventory. Said replacement of Franklin watches, however, were not purchased from the Franklin Corp. but from the manufacturer or importers of said watches.

(i) That as a result of the acts of the previous officers of said corporation and the rejection of said inventory on March 23, 1951, the defendant had on hand at the time it filed its price chart with the Office of Price Stabilization on or about May 1, 1951, an abnormally and unusually small quantity of Franklin watches and was without the usual and customary price ranges of watches having different costs.

(j) After March 23, 1951, the defendant replaced said depleted inventory with new inventory and with watches in the price ranges usually and customarily carried by the defendant prior to the depletion of said stock, and during the period from May 24, 1950, to June 24, 1950, as were customarily and regularly carried theretofore by the defendant.

(k) The defendant filed with the Office of Price Stabilization a chart of the depleted watch inventory on hand and

on the date required under the Regulation as of
19 May 1, 1951, and attached to said chart a notation that it is unable to determine the actual cost of said watches, this notation having been made for the reason that the defendant did not know the actual cost of said watches to the defendant or to said Franklin Corp.

(1) That it had been the practice of the defendant to add to the cost of nondescript or not nationally advertised watches a larger percentage mark-up than is added to nationally advertised items, and that in pricing the newly purchased inventory the defendant used the same business practices, cost prices, the same customary percentage margin over cost, and methods, as it had used prior to May 1, 1951, and during the period from May 24, 1950 to June 24, 1950 and thereafter, which cost practices are authorized under Title 50, App., paragraph 2102 (g) and (k) as amended, as follows:

> "(g) The powers granted in this title (sections 2101-2110 of this Appendix) shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except where such action is affirmatively found by the President to be necessary to prevent circumvention or evasion of any regulation, order, or requirement under this title (said sections).
>
> "(k) No rule, regulation, order, or amendment thereto shall be issued or remain in effect under this title (sections 2102-2112 of this Appendix), which shall deny sellers of materials at retail or wholesale their customary percentage margins over costs of the materials or their customary charges during the period May 24, 1950, to June 24, 1950, or on such other nearest representative date determined under section 402 (c) (subsection (c) of this section), as shown by their records during such period, except as to any one
> 20 specific item of a line of material sold by such sellers which is in short supply as evidenced by specific government action to encourage production

of the item in question; Provided, however, That if the antitrust laws of any State have been construed to prohibit adherence by sellers of materials at wholesale or retail to uniform suggested retail resale prices, the President shall issue regulations giving full consideration to the customary percentage margins of such sellers during the period hereinbefore set forth. No such exception shall reduce such customary margins of sellers at retail or wholesale beyond the amount found by the President, in writing, to be generally equitable and proportionate in relation to the general reductions in the customary margins of all other classes of persons concerned in the production and distribution of the excepted item of material.

"Prior to making any finding that a specific item of material shall be so excepted, or as to the amount of the reductions in customary margins to be imposed upon retail and wholesale sellers of such item, the President shall consult with representatives of the affected retail and wholesale sellers concerning the basis for and the amount of the exception which is proposed with respect to any such item.

"For the purposes of this section a person is a 'seller of a material at retail or wholesale' to the extent that such person purchases and resells an item of material without substantially altering its form; or to the extent that such persons sell to ultimate consumers except (1) to government and institutional consumers and (2) consumers who purchase for consumption in the course of trade or business."

18. Defendant further shows that from and after March 23, 1951, it had no independent buying office, that it bought all of its merchandise direct from the manufacturer or jobber of the various items; that all of the buying expenses formerly paid for by the Franklin Corp. were, from and after March 23, 1951, paid by this defendant which increased its cost of doing business. That under Section 2101 (k) above quoted, it had the right to maintain its same percentage markup over cost, which cost

it is entitled to increase to the extent of its increased cost of doing business; that the plaintiff has not given credit to the defendant in arriving at the proper retail price which the defendant was entitled to charge. Defendant alleges upon information and belief that it earned a profit from the operation of its business prior to March 23, 1951, but that since the acquisition of the stock by its present stockholder the defendant lost from the operation of its business during the period from June 30, 1951 to June 30, 1952, the sum of $3,490.31, and alleges upon information and belief that further sums were lost from June 30, 1952 to the date of the filing of the within suit; that the said loss was largely due to the increased cost of operating its business and to its increased buying costs.

19. Defendant further alleges that it offered to the Office of Price Stabilization in Atlanta, Georgia, to amend its price chart by adding thereto the items customarily and regularly carried in the inventory of the defendant during the period from May 24, 1950 to March 23, 1951, and that it had been informed by the officials of said Office of Price Stabilization that such amendment was not permissible.

WHEREFORE, defendant having fully answered, prays that the prayers of the plaintiff be denied and that de-
22 fendant have judgment in its favor.

(S.) J. KURT HOLLAND,
(S.) JACK H. ZINKOW,
Attorneys for Defendant.

J. Kurt Holland and
Jack H. Zinkow
Attorneys at Law
1116 First National Bank Bldg.

Duly sworn to by Harry K. Stern jurat omitted in printing.

• • • • •

23 IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—Filed February 25, 1954

Comes now the defendant, Schneer's Atlanta, Inc., and pursuant to Rule 56, FRCP, 28 U.S.C.A., moves the Court as follows:

1. To enter summary judgment for the defendant upon the ground and for the reason that there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law.

2. This motion is based upon the complaint, defendant's answer, and the affidavit of Harry K. Stern, President of defendant corporation, filed with this motion.

HAAS, HOLLAND & BLACKSHEAR
By (S.) M. H. BLACKSHEAR, JR.,
Attorneys for Defendant.

Certificate of service omitted.
Filed February 25, 1954.

24 IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF HARRY STERN IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—Filed February 25, 1954

STATE OF GEORGIA,
Fulton County.

In person appeared before the undersigned authority HARRY STERN who on oath deposes and says:

1

He is President of Schneer's Atlanta, Inc., (hereafter referred to as "Schneer's") and has served continuously as such since March 28, 1951.

2

All of the capital stock of Schneer's was, prior to March 23, 1951, owned by Franklin Corp., which has offices in

New York City, and which then owned all the capital stock of a number of other similar retail jewelry stores which were operated in the same manner as Schneer's.

3

During the period May 24, 1950 to June 24, 1950, the base period established in the Defense Production Act of 1950, and thereafter until March 23, 1951, Franklin Corporation served as a purchasing agent for its subsidiary retail corporations, including Schneer's, and it was its practice to purchase goods, including watches, which it resold to its subsidiary retailers at prices which included a markup over Franklin Corporation's costs designed to cover the buying and handling expense of Franklin Corporation.

4

All invoices and other cost records of the Franklin Corporation were maintained in its offices in New York City, are not now and have not been available to the management of Schneer's since March 23, 1951, and the exact amount of costs to Franklin Corporation are not known to this deponent, although deponent is informed and believes that these costs to Franklin Corporation are not known to this deponent, although deponent is informed and believes that these costs to Franklin Corporation probably fix ceiling prices for Schneer's under Sec. 55(e) of Ceiling Price Regulation 7.

5

On March 23, 1951, deponent and his associates acquired by purchase from Franklin Corporation all of the capital stock of Schneer's.

6

At the time of the transfer of ownership and the ensuing change of management and operating personnel, the present officers and employees of Schneer's had no information as to the costs of items in stock except the cost marked on the item which represented not the true cost to Franklin Cor-

poration but its cost plus its expenses of buying as described.

7

Prior to the purchase of March 23, 1951, aforesaid, and in anticipation of this purchase the stock of mer-
26 chandise was purposely allowed to fall below normal and at the time of purhase a considerable amount of merchandise was rejected and returned to Franklin Corporation so that for several months after March 23, 1951, the stock of Schneer's was broken and much below normal.

8

The purchase price paid for the capital stock was based upon the value of the inventory at the time of the sale.

9

After the purchase of stock on March 23, 1951, the Office of Price Stabilization by Amendment No. 2 to C.P.R. 7 (16 F. R. 3006) which became effective on April 10, 1951, retail sales of all watches were made subject to the ceiling prices established by that regulation and these ceiling prices were fixed by reference to the costs and selling prices of each individual merchant for the goods he had on hand for sale on March 31, 1951, when Schneer's stock was broken and depleted.

10

No exercise of reasonable care or business judgment by Schneer's could have prevented the establishment of inequitable and unfair ceiling prices for its watches because the base pricing date was selected retroactively.

11

Schneer's undertook to file a base date pricing
27 chart—notwithstanding the fact that it did not know the cost of its watches to Franklin Corporation, and, therefore, it used in preparing its base date pricing chart the best information available to it, to wit: the cost prices marked in code on the individual items of stock which

included Franklin Corporation's cost plus a sum representing the cost or value of its services as buying agent.

12

This inaccurate statement of cost becomes highly significant because after March 23, 1951, Schneer's purchased its watches directly from the suppliers from whom Franklin Corporation previously bought and at the same prices paid by Franklin. A reduction of a few cents in cost price could, under the peculiar circumstances hereafter stated, result in the establishment of a ceiling price under CFR 7 on the same item many dollars lower than the price at which Schneer's sold that item during the base period May 24-June 24, 1950, and thereafter until April 10, 1951.

13

The base date pricing chart so fixed by Schneer's was accompanied by a written explanation of this inaccurate listing of cost.

14

Since May 24, 1950, Schneer's has handled two classes of watches and has consistently followed for that entire period different pricing and mark-up policies.

28

15

One class of watches consists of nationally advertised watches such as Gruen, Benrus, Bulova, Hamilton and Longines. Since the manufacturers of such watches spend a great deal of money on magazine, newspaper, radio and television advertising, all of which may be characterized as selling costs, the retailer's costs on such watches are higher than they would be otherwise and are easier for the retailer to sell. The retailer's costs on such nationally advertised watches, therefore, includes a substantial part of their selling costs.

16

In addition, such watches have retail prices preticketed and the manufacturers insist that these suggested resale

prices be strictly maintained under applicable fair trade and other laws.

17

At all times material since May 24, 1950, Schneer's has followed the business policy and practice of selling jewelry and watches on liberal, long term, installment credit and added no additional amount to its cash price for or by way of interest, carrying charge or other charge for such credit.

18

This liberal credit policy applied to nationally advertised watches, and the prices at which it sold them on long term installment credit were the same prices charged for cash sales of the same watches by it and by other retail jewelers who offered no installment credit.

19

It is good business policy for Schneer's to handle these nationally advertised watches even though the losses and expense incident to their sale on long term installment credit reduces the profit on such sales below that realized by retailers of watches who sell only for cash or short-term credit because only by offering their customers an opportunity to select from a large and varied stock of watches may Schneer's attract customers in adequate number to operate effectively.

20

The other class of watches which Schneer's sold continuously from May 24, 1950 to the present time are watches which are not nationally advertised and which for that reason are priced lower to it and on which Schneer's sales costs are higher, because it must provide all advertising necessary to create a demand for them. For convenience this class of watches will be referred to herein as "nondescript" watches.

At all times material to this action and to this motion a substantial portion of Schneer's sales of watches consisted of sales of nondescript watches which were manufactured

21

by the Winton Watch Company and sold to Schneer's
30 and others under the brand name "Franklin".

22

During the period from May 24, 1950 to June 24, 1950 and for the entire period material to this action since the latter date, it was the business practice of Schneer's to charge for Franklin watches a different and higher mark-up or profit margin than that charged for nationally advertised watches.

23

Under normal conditions of inventory approximately one-third of watches in Schneer's stock are Franklin watches, and under such conditions approximately one-third of the different cost prices on watches represent cost prices on Franklin watches.

24

Solely because of the unusual and abnormal conditions which accompanied the sale of the capital stock of Schneer's on March 23, 1951, on the pricing base date, March 31, 1951, Schneer's had in its watch inventory "in its store, unpacked and available for sale on that date" only 13 different Franklin watches out of a total of 165 different watches.

25

From May 24, 1950 to June 24, 1950, and thereafter until March 31, 1951, it was the practice of Schneer's and other credit jewelers whose business was comparable to that of Schneer's to charge a higher mark-up over cost for
31 nondescript watches, including Franklin watches, then they charged on advertised watches. It was not their practice to apply a uniform flat percentage mark-up on either advertised or nondescript watches. On some watch items the price and profit was lower so that the item would serve as a price leader, on other items price and profit was lower to make a particular watch competitive.

26

In practically every case of either nondescript or advertised watches the mark-up was so adjusted as to result in a selling price which, including Federal Excise Tax, would be either even dollars, or in quarters of a dollar or in the less expensive item, in five cents less than the even dollar. For example, some of its typical selling prices, including Federal Excise Tax, are and were $22.95, $24.95, $29.75, $29.95, $33.75, $37.75, $42.50, $45.00, $49.75, $50.00, $59.50, $65.00.

27

Retail price tags were invariably placed in each watch box on both advertised and nondescript watches during the period May 24-June 24, 1950, before price controls became effective; after price controls became effective until CPR 7 became applicable to watches on April 10, 1951; and during the period March 1, 1952 through February 28, 1953, which is the period covered by this action.

28

32 Deponent includes herewith a list of the data shown on the list date pricing chart for Franklin watches on hand and offered for sale by Schneer's on March 31, 1951, showing as to each the net cost, the offering price, the percentage of mark-up, the total net cost for all Franklin watches so listed, the total offering price and the average percentage mark-up on Franklin watches as follows:

Net Cost (per unit) Terms	Offering Price (per unit)	Percentage Mark-up on Cost
8.77	22.95	161.7
9.27	24.95	169.1
10.25	29.95	192.2
10.73	29.75	177.3
10.73	33.75	205.0
12.69	37.75	197.5
14.65	42.50	190.1
16.41	49.75	203.2
16.91	59.50	251.9
17.59	59.50	238.3
18.57	59.50	220.4
21.06	65.00	208.6
25.96	65.00	150.4
193.59	579.85	199.5

29

The list date pricing chart in addition to the Franklin watches described in paragraph 28 hereof listed 152 other watches having a total net cost of $3,981.58 and a total offering price of $8,462.08, making the average mark-up on these advertised watches 112.5 per cent.

30

After March 31st, Schneer's did not increase its
33 prices or in any way change its pricing practices on either nondescript or advertised watches, but continued to sell them in the manner described and at prices calculated to yield the same profit margins as realized on and before March 31, 1951, and from May 24, 1950 to March 31, 1951.

31

Government's Exhibit "A" attached to the complaint discloses that the Government in this action insists upon fixing ceiling prices for Schneer's on Franklin watches with reference to the prices charged on advertised watches on the base day. A comparison of Exhibit "A" with the list date pricing chart shows for example that the first of the overcharge items listed on the Government Exhibit "A" to its complaint cost $20.45. The list date pricing chart listed no watch having this precise cost so the calculated ceiling price as shown on Exhibit "A" was calculated by interpolating the average mark-up on a Bulova watch having a cost of $19.55 and a Benrus watch having a cost price of $20.53.

The second overcharge item had a cost of $25.95. The list date pricing chart listed no watch having this precise cost and the Government computed the ceiling by interpolating the average mark-up shown on the list date pricing chart for an Elgin watch having a cost of $25.63 and a Franklin watch having a cost of $25.96.

34 The third item on Exhibit "A" is a Franklin watch having a cost of $12.45. Since the list date pricing chart contained no such cost for Franklin watches,

the Government computed the ceiling by interpolating the average mark-up for a Roamer watch having a cost of $12.21 and a Franklin watch having a cost of $12.69.

In like manner, the fourth item of Exhibit "A" is a Franklin watch having a cost of $8.25, on which the Government computed a ceiling by interpolating the average mark-up of two Medana watches, one of which had a cost of $1.30 and the other $8.29.

The fifth overcharge item was a Franklin watch having a cost of $29.95. The ceiling for this item was computed by averaging the mark-up for a Gruen costing $29.35, and an Elgin costing $30.08.

The sixth item was a Franklin watch costing $15.95 and the ceiling therefor was computed by using two Benrus watches, one of which cost $15.93 and the other $16.41.

The seventh item was a Franklin watch costing $19.15. While the list date pricing chart lists no Franklin watch with such cost, the chart does list an Elgin watch having the precise cost. So the Government used the mark-up for the Elgin watch.

The eighth overcharge item is a Franklin watch also having a cost of $19.15, for which the Government used the same Elgin watch.

35 The ninth overcharge item is a Franklin watch with a cost of $19.95 and for which a ceiling was computed by using prices charged for an Elgin watch costing $19.65, and Benrus costing $20.53.

The tenth overcharge item is a Franklin watch costing $15.95. Ceiling for that watch was fixed by using two Benrus watches, one of which had a cost of $15.93 and the other a cost of $16.41.

32

The foregoing illustrations are typical and examination of other enumerated overcharge items will reveal that ceilings were in all costs calculated by using cost prices on an entirely different class of merchandise.

The effect of such action and such application of the regulations is to require Schneer's to abandon its traditional business and pricing policies and adopt for nondescript watches an entirely different mark-up and pricing policy.

(S.) HARRY K. STERN.

Sworn to and subscribed before me this 30th day of November, 1953.

(Seal) (S.) ROSE SCHREIBER,
Notary Public, State at Large, Georgia.

My Commission Expires Aug. 6, 1954.
Filed Feb. 25, 1954.

36 In United States District Court

AFFIDAVIT OF HAMILTON B. STEPHENS IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—Filed March 15, 1954

STATE OF GEORGIA,
COUNTY OF FULTON:

In person appeared before the undersigned attesting officer duly authorized to administer oaths, HAMILTON B. STEPHENS, who on oath deposes and says as follows:

I was a Special Agent-Attorney with the Office of Price Stabilization, Atlanta, Georgia, in the year 1952 and as such made inspections and investigations to determine compliance with the various Ceiling Price Regulations promulgated by the Office of Price Stabilization.

During the course of my employment with the Office of Price Stabilization I had occasion to become familiar with Schneer's Atlanta, Inc., defendant in this action, and various other jewelry concerns in the State of Georgia. I made an audit of defendant's business and determined certain overcharges in the sale of watches for the month of March, 1952 and computed overcharges amounting to $328.94.

Defendant filed with the Office of Price Stabilization a pricing chart under Ceiling Price Regulation 7 which was used as the basis for computing overcharges. Defendant furnished and filed this pricing chart in accordance with responsibility placed on it by Ceiling Price Regula-
37 tions. Defendant is therefore bound by its pricing chart and to the best of my knowledge and belief defendant never submitted a new pricing chart or other amendment to the one submitted, which it could have done.

It is my opinion that the cost of these watches to the Franklin Corporation, as mentioned in affidavit of Harry Stern has no bearing on the matter of the overcharges in this case, as the only pertinent thing is the cost to the retailer or whoever sold the watches in the base period. The regulation governing sales of watches was based on the price the watches sold for during the base period and what the percentage markup was during the base period.

To the best of my knowledge and belief Section 402(g) of the Defense Production Act of 1950 referred only to practices established in an industry and such practices must be shown to be industry-wide rather than in one separate business establishment.

I have read the affidavit of Mr. Harry Stern and even if all of the facts set out therein were uncontroverted, it is still only saying that the pricing method under the Regulation worked a hardship on Schneer's. Even if a hardship was worked on Schneer's it would not mean that its business practices were required to be changed by the Regulation.

(S.) HAMILTON B. STEPHENS.

Sworn to and subscribed before me this 12 day of March, 1954.

(S.) CHARLES H. BRUCE,
Notary Public, Fulton County, Ga.

Filed Mar. 15, 1954.

38 In United States District Court

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—September 14, 1954

Defendant filed motion for summary judgment on February 25, 1954. Upon oral argument the sole ground urged was that the defendant in this case had the right to attack in this court certain regulations enacted pursuant to the Defense Production Act of 1950. Defendant contended that, said Act having been repealed, it is no longer necessary for defendant to pursue the administrative remedies therein contained, especially since no savings clause to that effect was contained in the repealing Act.

No cases are cited by defendant expressly sustaining its position. That defendant's rights must be urged before the Emergency Court of Appeals has been recognized in several decisions since repeal of the Defense Production Act, and this Court is of the opinion that since the Emergency Court of Appeals still exists, defendant's attack upon the regulations herein involved must be urged before that court.

Said motion for summary judgment is therefore overruled and denied.

This the 14th day of September, 1954.

FRANK A. HOOPER,
United States District Judge.

Filed September 14, 1954.

39 In United States District Court

CONSENT JUDGMENT—March 25, 1955

It appearing to the Court that the Attorney General of the United States has, on behalf of the United States of America, authorized a compromise settlement of the above-styled case in the sum of $3,032.76, and that such settlement is agreed and consented to by defendant, at SCHNEER'S ATLANTA, INC. it is hereby

CONSIDERED, ORDERED AND ADJUDGED that plaintiff, United States of America, do have and recover of defendant, SCHNEER'S ATLANTA, INC., the sum of $3,032.76, plus costs.

It is stipulated and agreed by the parties that any right defendant may have to appeal to the Emergency Court of Appeals, Office of Defense Mobilization or United States Court of Appeals as to the validity of the Office of Price Stabilization regulation involved is reserved and protected.

This 25th day of March, 1955.

(S.) FRANK A. HOOPER,
United States District Judge.

Consented to:

(S.) JAMES W. DORSEY,
United States Attorney.

(S.) CHARLES D. READ, JR.,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

(S.) M. H. BLACKSHEAR, JR.,
HAAS, HOLLANDER & BLACKSHEAR,
Attorneys for Defendant.

Filed March 25, 1955.

40 In United States District Court

NOTICE OF APPEAL—Filed May 23, 1955

Notice is hereby given that SCHNEER'S ATLANTA, INC., the defendant named above, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on March 25, 1955.

This 23rd day of May, 1955.

(S.) M. H. BLACKSHEAR, JR.,
Attorney for Defendant.

HAAS, HOLLAND & BLACKSHEAR,
Attorneys-at-Law
1116 First National Bank Building,
Atlanta, Georgia,
Of Counsel for Defendant.

Filed May 23, 1955.

41 In United States District Court

ORDER ALLOWING MOTION TO EXTEND TIME FOR FILING THE RECORD ON APPEAL AND DOCKETING THE APPEAL—June 21, 1955

Motion of the defendant, Schneer's Atlanta, Inc., having been considered, IT IS ORDERED that the motion be granted and the period for filing the record on appeal and docketing the appeal is hereby extended to 70 days from the date of filing the notice of appeal.

This 21st day of June, 1955.

(S.) FRANK A. HOOPER,
United States Judge.

Motion omitted.

Filed June 21, 1955.

42 In United States District Court

DESIGNATION OF THE RECORD PURSUANT TO RULE 75, RULES OF CIVIL PROCEDURE—Filed June 21, 1955

The appellant in the present case designates the following portions of the record, proceedings and evidence to be included as the record on appeal:

1. Complaint of the United States of America, filed February 19, 1953.
2. Appellant's answer to complaint filed March 16, 1953.
3. Appellant's motion for summary judgment filed February 25, 1954.
4. Affidavit of Harry K. Stern in support of motion for summary judgment filed February 25, 1954.
5. Affidavit of Hamilton B. Stephens, Special Agent-Attorney, Office of Price Stabilization, in opposition to motion for summary judgment filed March 12, 1954.
6. Order of Court denying appellant's motion for summary judgment filed September 14, 1954.
7. Consent judgment approved by Court and filed March 25, 1955.
8. Statement of points.

Appellant relies upon the following points, to-wit:

(a) The United States District Court for the Northern District of Georgia, Atlanta Division, has
43 jurisdiction by virtue of 28 U.S.C., Section 1345, to decide the validity of regulations enacted pursuant to Defense Production Act of 1950 as amended (50 U.S.C. App. Section 2061, etc.).

(b) Ceiling price regulation No. 7 (16 F.R. 1872) as amended, issued pursuant to the Defense Production Act of 1950 is invalid in that Regulation No. 7 as applied to the Appellant under the facts deduced in this case denies the Appellant his customary percentage margin over cost of his sales and the customary charges during the period of May 24, 1950 to June 24, 1950, in violation of Sections 2102 (g) and 2102 (k) of Title 50 U.S.C.A. Appendix.

(c) Ceiling price regulation No. 7 (16 F.R. 1872) as amended, issued pursuant to the Defense Production Act of 1950 is invalid in that regulation No. 7 as applied to Appellant under the facts deduced in this case requires the Appellant to sell his materials at a ceiling price lower than the price prevailing just before the date of the regulations establishing the ceiling price, or during the period of January 25, 1951 to February 24, 1951, or between the period of January 1, 1950 to June 24, 1950, in violation of Section 2102 (d)4 of Title 50 U.S.C.A. Appendix.

44 9. The foregoing pleadings and evidence consist of all proceedings in the United States District Court for the Northern District of Geargia, Atlanta Division, that are essential to a decision by the Appellate Court, and there was no evidence other than the affidavits of Harry K. Stern and Hamilton B. Stephens introduced in the present case.

Respectfully submitted,

HAAS, HOLLAND & BLACKSHEAR,
By M. H. BLACKSHEAR, JR.,
Attorneys for Appellant.

Filed JUNE 21, 1955.

45-46 Clerk's Certificate to foregoing transcript (omitted in printing).

47 In the United States Court of Appeals for the Fifth Circuit

No. 15722

SCHNEER'S ATLANTA, INC., APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Northern District of Georgia

OPINION OF THE COURT—February 2, 1956

Before RIVES, TUTTLE and CAMERON, Circuit Judges

TUTTLE, Circuit Judge: This is an appeal from a judgment of the District Court awarding to the Government a sum representing three times the overcharges allegedly made by appellant in the sale of watches in excess of ceiling prices fixed under the Defense Production Act of 1950.

Schneer's attacked the price regulations in question
48 as invalid as to it. The Government contended, and the District Court determined, that it had no jurisdiction to consider this question, but that only the Emergency Court of Appeals could pass on the question of validity.[1]

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[1] The trial court said: "That defendant's rights must be urged before the Emergency Court of Appeals has been recognized in several decisions since repeal of the Defense Production Act, and this Court is of the opinion that since the Emergency Court of Appeals still exists, defendant's attack upon the regulations herein involved must be urged before that court."

It is not disputed that prior to termination of the Defense Production Act of 1950, the District Courts had no power to inquire into the validity of price regulations.[2]

[2] §2108. Jurisdiction of courts to determine validity of regulations—(a) Action in Emergency Court of Appeals after denial of protest

* * * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of Title 28. The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order relating to price controls, issued under this title [sections 2101-2110 of this Appendix], and of any provision of any such regulation or order. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation or order relating to price controls, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title [said sections] authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 409 or 706 of this Act [sections 2101-2110 of this Appendix], the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the

49 The sole narrow issue presented here is whether the termination of the Defense Production Act rendered inoperative this provision placing exclusive juris-

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President setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 407 of this title [section 2107 of this Appendix.] Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation or order complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the President or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 409 or 706 of this Act [section 2109 or 2156 of this Appendix] or section 371 of Title 18, involving an alleged violation of any provision of any such regulation or order, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 407 of this title [section 2107 of this Appendix] prior to the institution of the proceeding under section 409 or 706 of this Act [section 2109 or 2156 of this Appendix] or section 371 of Title 18, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

diction in the Emergency Court. There can be no doubt that if it did then appellant would have the right to have the District Court, whose jurisdiction the Government invoked

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(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 409 (a) or 706(a) of this Act [section 2109 (a) or 2156 (a) of this Appendix] the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation or order involved in the proceeding. If any provision of a regulation or order is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 408(b) of this title [subsection (b) of this section], any proceeding pending in any court shall be dismissed, and any judgment in which proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 407 of this title [section 2107 of this Appendix], or judicial proceedings under this section, shall not be grounds for staying any proceeding brought pursuant to section 409 or 706 of this Act [section 2109 or 2156 of this Appendix] or section 371 of Title 18; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under this title [sections 2101-2110 of this Appendix].

50 U. S. C. A. Appendix, §2108 (d) (e).

to seek a penalty against appellant, pass on the
50 legality of the regulations on which the Government's claim was based.

The Emergency Court was in existence at the time of the enactment of the Defense Production Act.[3] It was given jurisdiction over matters relating to regulations of the later law by Section 408 (c), (d) and (e) of that Act.[4] That law was in effect when the proceeding here was commenced by the Government on February 19, 1953. It expired by its own terms at the close of April 30, 1955.
51 On February 25, 1954, appellant filed a motion for summary judgment upon the pleadings and upon the affidavit of its president, making its attack on the validity of the regulations as to it. On September 14, 1954, the District Court denied the motion for summary judgment without passing on the merits of the question of validity, holding that it was without jurisdiction to consider the question.

The parties here apparently concede that there was no saving clause contained in the Act itself that would have the effect of continuing in effect the limitation on the District Court's jurisdiction,[5] and we must conclude, therefore, that if this limitation outlived the repeal of the statute creating it this must follow from what is known as the general Saving Statute.[6] It will be noted that the first sen-

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[3] It was first created by the Emergency Price Control Act of 1942. 50 U. S. C. A. Appendix, §924(c).

[4] 50 U. S. C. A. Appendix, §2108 (c), (d) and (e).

[5] The Government's brief does not even discuss the effect of the termination of the law, but treats the matter simply as if the entire law were still in force.

[6] 1 U. S. C. A.

§109. Repeal of statutes as affecting existing liabilities "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall

tence of the law dates from 1871 and only the second sentence is new. It merely makes the same rule applicable to a "temporary statute." We may, therefore, look to cases construing the first sentence to determine the answer to our question. This question, in its simplest form, is whether this sentence in the savings statute continued Sec-
52 tion 2108 (d) and (e) [7] in life for the purpose of conferring this particular jurisdiction on the Emergency Court of Appeals and denying it to the District Court. Unless it did so keep it in life, then the case is concluded in appellant's favor under the principle announced by the Supreme Court in *Bruner v. U. S.*, 343 U. S. 112: "This rule—that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law—has been adhered to consistently by this Court."

In that opinion the court then concluded by a holding that, it seems clear to us, proceeded to answer the question itself. It held that the general savings statute does not preserve a right to have a claim heard by any particular tribunal, but preserves only the right itself. This was the holding in *Hollowell v. U. S.*, 239 U. S. 506, wherein was involved a statute giving the Secretary of the Interior the authority to ascertain the heirs of certain Indian intestates. The court disposed of the plaintiff's argument that it had

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so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

[7] Supra, Note 4.

a right to have the district court hear his claim (as was the procedure when the claim arose), and that this right was preserved by the general savings statute, by saying that the Act conferring jurisdiction upon the Secretary "takes away no substantive right but simply changes the tribunal that is to hear the case." 239 U. S. 506, 508.

Although the subsequent case of *De La Rama Steamship Co. v. U. S.*, 344 U. S. 386, does stress the fact that too much significance has been attached to the separateness of "right" from "remedy" where the repealed law
53 combines the elements of both, there is nothing in that case to modify the Bruner holding. In De La Rama the court pointed out that a denial of the option of the libelant to present its right of action in admiralty or in the Court of Claims would "mutilate that right" because in admiralty interest arises from the time of filing the libel, whereas it follows only upon entry of judgment in the Court of Claims.

Moreover the language of the savings clause itself shows its clear applicability to a statute which gives a particular procedural benefit coupled with a substantive right, as in De La Rama; whereas, the statute does not by its terms apply to a statute, or part of a statute, which merely limits, within the federal system, the courts which can determine the legality of government regulations. The section of the Defense Production Act which imposes such limitation is not one which "creates any penalty, forfeiture or liability," and the perpetuation of this section is not needed to sustain any "proper action or prosecution for the enforcement of such penalty, forfeiture or liability." It is not, then, as was the statute before the Supreme Court in De La Rama, one whose perpetuation was expressly within the language of the savings statute.

Here, neither party is deprived of any substantive right or benefit by a holding, contrary to Bruner and Hallowell, that the procedural provision of the Defense Production Act of 1950 survived its repeal, because it is of convenience to the defendant and of no greater burden to the Government to have the entire enforcement suit litigated in the

same court, especially since it is apparent from the fact of repeal that the great urgency of enforcement that
54 provided the justification for establishing jurisdiction in a special tribunal no longer exists. Matters may now follow their normal and ordinary course, in which the Court which is called upon to enforce a regulation shall have the opportunity to pass in the first instance upon its validity.

We do not pass on the question of validity of the regulations in question, but return the case for the District Court to do this.

The judgment is reversed and the case remanded for action by the trial court consistent with this opinion.

Reversed and Remanded.

55 No. 15722

SCHNEER'S ATLANTA, INC.,

versus

UNITED STATES OF AMERICA

JUDGMENT—February 2, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for action by the trial court consistent with the opinion of this Court.

56 Clerk's Certificate to foregoing transcript omitted in printing.

ORDER ALLOWING CERTIORARI—Filed June 11, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 992349 44